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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 242.

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "NAVEMAR",
Petitioner,

—against—

Spanish Steamship "NAVEMAR", her engines, etc., and RAFAEL CRESPO, JOSE ARANA, MANUEL FREIRE, GASPAR LOPEZ and ANTONIO SANCHEZ,

(No appeal was taken by them)

FERNANDO DE LOS RIOS, Ambassador of the Republic of Spain, applicant,
Respondent in this Court.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI.

Opinions Below.

The official reports of the Opinions rendered by the Courts below are as follows:

(1) *The Navemar,* 17 Fed. Supp. 647

(Denial of first application of Ambassador to intervene.)

(2) *The Navemar,* 17 Fed. Supp. 495

(Motion to punish crew for contempt of Court for refusal to leave the "Navemar".)

(3) *The Navemar,* 18 Fed. Supp. 153

(Denial of second application of Ambassador to intervene.)

(4) *The Navemar,* 90 Fed. (2d) 673

(Opinion of the Circuit Court of Appeals for the Second Circuit reversing order of the District Court on second application of Ambassador to intervene.)

Statement of the Case.

No complete statement of facts is contained in petitioner's brief and in order to supply this omission and to correct certain inaccuracies in petitioner's review of the proceedings in the Courts below, we submit herewith the following summary of the facts of this case which are material to the issues.

Statement of Facts.

On September 11, 1936, the Spanish Steamship "Navemar" sailed from New York. After stopping at St. Thomas, Virgin Islands, at Rio de Janeiro and at Montevideo she arrived at Buenos Aires on October 9, 1936 (R. 169).

On the 10th day of October, 1936, while the "Navemar" was in Argentina the President of the Republic of Spain issued a decree to the effect that the Republic of Spain expropriated the steamship "Navemar" owned by Compania Espanola de Navegacion Maritima, S. A. for use of the national public service, which decree provided, among other things, that the "Navemar" be managed by the Minister of Communications and Merchant Marine through the General Bu-

reau of Merchant Marine. In said decree it was provided that the decree would become the law of the Government of Spain on publication of the decree in the Gaceta de Madrid. The publication took place on October 11, 1936. The decree provided that the fact of the attachment and "the consequent change of authority" should be noted on the documents of the vessel (R. 119).

At Buenos Aires on October 16, 1936, the master of the "Navemar" received a cablegram from the Director of Navigation of the Republic of Spain informing him of the confiscation of the "Navemar" (R. 15). On receipt of the cablegram, Martinez, the master of the "Navemar", presented himself to the Spanish Consul in accordance with the instructions received from the Director of the Spanish Merchant Marine (R. 16). For the purpose of receiving additional cargo the "Navemar" proceeded from Buenos Aires to Rosario. The master of the "Navemar", Martinez, testified as follows:

> "I proceeded to Rosario. I wrote a letter back to Buenos Aires putting myself again at the disposal of the Spanish Consul General, and proceeded to Rosario, since he gave me no other instructions" (R. 17).

At Rosario he loaded additional cargo consigned to the charterers, Linea Sud Americana, and deposited the ship's roll with the Consul (R. 17). The "Navemar" then left Rosario on advices of the Maritime Commission because of impending low water (R. 17). At the time of departure the Consul's office was closed and the ship departed without her roll and returned to Buenos Aires for additional cargo (R. 18). The mas-

ter then again reported to the Consul General at Buenos Aires and requested him to arrange to have the ship's roll sent by the Consul at Rosario to the ship's agents at Buenos Aires. The Consul at Rosario did not comply with this request, but instead forwarded the ship's roll to the Consul General at Buenos Aires (R. 18).

The Consul General at Buenos Aires thereupon delivered the ship's roll, together with the ship's register (which during all this time had been in the possession of the Consul General at Buenos Aires), to the master of the "Navemar" (R. 19). At the time of the delivery of these documents the attention of the master of the "Navemar" was called to an endorsement which had been made on each of these documents by the respective Consuls. On the ship's roll the Consul at Rosario made an endorsement, over his signature and official seal, which, translated, reads as follows:

> "Through a cable dated 26 of the instant month from the Director General of the Merchant Marine this ship has become the property of the State through attachment according to the Decree of Oct. 10, 1936" (R. 123).

On the ship's register the Consul General at Buenos Aires made an endorsement, which translated from the Spanish reads as follows:

> "By cable dated the 15th of October of 1936 to the Spanish Embassy at this capital, His Excellency, the Minister of the Secretary of State, informs that this vessel passes to be the property of the Spanish Government by decree of confiscation published in the Gazette on the date of the 11th of the present month" (R. 23, 123).

As the Consul General at Buenos Aires had not as yet received specific instructions regarding the "Nave-

mar" from the Director of the Merchant Marine at Madrid, he authorized the master to continue his voyage to New York (R. 23). The master of the "Navemar" thereupon cabled the Director of the Spanish Merchant Marine confirming these instructions. The cablegram, translated, reads as follows:

> "General Director of Merchant Marine,
> Madrid
>
> Authorized by Consul General we sail for New York Greetings
>
> Signed MASTER 'NAVEMAR'"

(R. 141).

On October 28, 1936, the "Navemar" sailed from Buenos Aires and on arrival at New York deposited her documents with the Collector of Customs at the Port of New York (R. 142). Among these documents was the ship's register on which appeared the endorsement to the effect that the "Navemar" was owned by the Republic of Spain. The manifests of the "Navemar" (Exhibit 23), which were also deposited with the Collector of Customs of the United States, contained the notation that the "Navemar" was "owned as set forth in the register" (pp. 236, 237, 238).* Hence, when the ship entered the Port of New York her documents showed that she was the property of the Republic of Spain.

After arrival at New York the master of the "Navemar" recognized and represented that he was operating the ship for the Republic of Spain even as late as December 7, 1936 (the date on which the libel was filed), when he wrote to the charterers of the ship, Linea Sud Americana, as follows:

---

* These references are to original record, the manifests not having been reproduced in the reprint of the record.

"On October 28, 1936, possession of the SS 'Navemar' was taken by the Spanish Government and the ship was confiscated by decree of October 10 published in the official Gaceta October 11 according to orders which I received at Buenos Aires on October 16, 1936 from the Director General of the Merchant Marine at Madrid.

Since October 28th I have been generally under orders of the Spanish Government as given me by the Spanish Consul at Buenos Aires.

Since October 28th. I have been operating under orders of the Spanish Government as given me by the Spanish Consul at Buenos Aires. While I was in Buenos Aires, on October 28th., I was shown the original of a letter, dated October 26th., addressed to Messrs. Garcia & Diaz, Ltda., S. A. de Representaciones Maritimas, Sarmientos 329, by the Spanish Consul there, reading as follows:

'Please be informed by this letter that as per information received from Madrid, through the Spanish Embassy in this Capital, the steamer consigned to you of the Compania Espanola de Navegacion Maritima, S. A. "Navemar" has been confiscated by the Government of the Spanish Republic; and the Captain of said vessel should follow the instructions that officially he may receive from the corresponding Department.

Which I communicated to you for your knowledge and respective effects.

Yours very truly,

The Spanish Consul in
charge of the Consulate General
AMADOR SANCHEZ'

While at Rosario I presented myself to the Spanish Consul there and he noted on the ship's articles on October 26th, the fact that the ship was now the property of the Spanish Government. Later on October 28th, when I was at Buenos Aires a similar notation was made on the ship's official register by the Spanish Consul there.

I attach photostats of the ship's articles and the ship's register showing these notations. Since arriving at New York I have presented myself to the Spanish Consul here and he has given me orders that the steamship 'Navemar' *is still to be held at the disposal of the Spanish Government.* With this letter I hand you a copy of the official letter which I have received from the Spanish Consul at New York" (Libelant's Exhibit 7; R. 26).

Prior to the writing of this letter, Martinez, master of the "Navemar", so far recognized the fact that he was acting for the Republic of Spain that he went to Luis Careaga, acting Consul General at New York, and received from him funds to cover wages and advances made by the master for account of the crew. On receipt of the money he signed the following document:

"Received from the Honorable Consul General of Spain in New York the amount of $300. as an advance to attend to the expenses of the vessel of my command.

New York, December 2, 1936.

MANUEL MARTINEZ
Master of the Steamer 'Navemar'."

(R. 152).

Proceedings in the Courts Below.

On or about December 3, 1936, a dispute arose between the master of the "Navemar" and the committee* of the crew. After this dispute had arisen the master of the "Navemar", together with two members of the duly elected committee, proceeded to the office of the Consul General of Spain and submitted the dispute to the Spanish Consul in accordance with Article XXIII of the Treaty of Friendship and General Relations between Spain and the United States, 33 Statutes at Large (Part 2) 2105 (Appendix A).

The Consul General of Spain had exclusive authority to investigate and determine this dispute between the master and crew of the "Navemar". No provision is made either in the treaty or in the laws of the United States for an appeal to or review of his decision by any of the courts of the United States.

The Consul General of Spain, after hearing both sides of the dispute, concluded that the actions of the committee of the crew were proper and hence entitled to his approval.

Shortly thereafter the master of the "Navemar", Martinez, was relieved of command of his vessel and another master, Tomas Pascual, was appointed by the Consul to take command of the "Navemar" (R. 124).

Despite this determination of the dispute between the master and crew by the Consul, petitioner insti-

---

* Under the laws of the Republic of Spain (R. 71, 72) committees of the crew are authorized to deal with the master in respect to certain specified details relating to the operation of a Spanish vessel. The five named respondents constituted such a committee on the S. S. "Navemar".

tuted an action in the United States District Court seeking to overrule the decision of the Consul General and to take the vessel from the Republic of Spain (Libel R. 4, 5).

Process was issued *in rem* against the steamship and against five named members of the crew for the purpose of quelling disorder on board a foreign ship, a procedure authorized neither by law nor treaty.

The process was made returnable on December 9th, two days after the libel was filed, and hearings were held forthwith by the District Court.

A final decree granting possession of the vessel to the libellant was thereupon entered, and although the libel had been brought against only five members of the crew, the process of the Court was used to remove the entire ship's personnel (see Appendix C).

In the meantime the Ambassador, Fernando de los Rios, had made representations to the Secretary of State of the United States. The Secretary of State replied that it was not the policy of this government to intervene in such matters (R. 255), whereupon the Ambassador authorized Jesse L. Rosenberg to act as attorney for him in the Courts of the United States (R. 253). The Ambassador twice sought unsuccessfully to intervene as claimant of the "Navemar", and then appealed to the Circuit Court of Appeals.

In due course the appeal was argued and the order of the District Court denying the second application of the Ambassador to intervene was reversed by the Circuit Court with directions to the District Court to enter an order dismissing the libel for lack of jurisdiction.

Summary of Argument.

The following is a brief summary of the argument submitted on behalf of Fernando de los Rios, Ambassador of the Republic of Spain, respondent in this Court:

(1) The several appearances of the Acting Consul General in open court were in accordance with the provisions of the Treaty between Spain and the United States, and of Section 256 of the Foreign Relations Law; the subsequent application of the Ambassador to become a party to the litigation and thus raise the jurisdictional question followed the procedure outlined by this Court in *Ex Parte Muir,* 254 U. S. 522.

(2) On principles of international comity, the statement of the Ambassador as to the right of the Republic of Spain to possession of the "Navemar", a Spanish vessel which, at the time of requisition by the Republic of Spain, was owned by a Spanish corporation, should be accepted as conclusive by the courts of the United States.

(3) If, as stated by petitioner, this suit was instituted because of the unlawful action of five members of the crew of the "Navemar", all of whom were Spanish citizens, the courts of the United States had no jurisdiction because of the provisions of the Treaty; if, on the other hand, this is a possessory suit in which a Spanish corporation is endeavoring to question the right of the Government of Spain to possession of the "Navemar", the matter is not justiciable, and the Circuit Court properly declined to take jurisdiction, since a sovereign is not subject to the process of the Court.

(4) That the steamship "Navemar" was actually in the possession of the Republic of Spain at the time of her arrival in the United States is conclusively established not only by the Ambassador's representations, but also by the proofs offered by the libelant in the District Court before the entry of the default decree.

(5) The steamship "Navemar" having been in the actual possession of the Republic of Spain at the time of her arrival in the United States, the proceedings now before the Court cannot be interpreted as an attempt on the part of the Republic of Spain to enforce a decree of confiscation within the territorial limits of the United States.

(6) The United States Circuit Court of Appeals, having reversed the order of the District Court denying the application of the Ambassador to intervene, properly directed the District Court to vacate the decree and dismiss the libel.

POINT I.

The several appearances of the Acting Consul General in open court were in accordance with the provisions of the Treaty between Spain and the United States, and of Section 256 of the Foreign Relations Law; the subsequent application of the Ambassador to become a party to the litigation and thus raise the jurisdictional question followed the procedure outlined by this Court in *Ex Parte Muir*, 254 U. S. 522.

A.

At page 18 of the brief filed on behalf of the petitioner it is argued that Acting Consul General Careaga was without authority to make any representations whatever on behalf of the Republic of Spain and that the Court should have disregarded his application.

Article XXI of the Treaty of Friendship and General Relations between the United States of America and Spain, U. S. Statutes at Large, 33 Stat. (Part 2) 2105, provides as follows:

> "The Consuls-General, Consuls, Vice-Consuls and Consular Agents of the two High Contracting Parties, shall have the right to address the authorities of the respective countries, national or local, judicial or executive, within the extent of their respective consular districts, for the purpose of complaining of any infraction of the treaties or conventions existing between the two countries, or for purposes of information, or for the protection of the rights and interest of their countrymen, whom, if absent, such consular officers shall be presumed to represent.

> If such application shall not receive proper attention, such consular officers may, in the absence of the diplomatic agent of their country, apply directly to the Government of the country to which they are commissioned."

We submit that the Consul General's appearance before the Court was strictly in accordance with the foregoing provisions of the Treaty between Spain and the United States.

The libel was filed on December 7, 1936, and process was returnable on December 9th. On that day Acting Consul General Careaga appeared by counsel before the United States District Court and objected to the jurisdiction of the Court. On December 11, 1936, Careaga appeared in person before the Court, and offered to explain the situation to the District Judge. His offer was refused (R. 34). On December 14, 1936, at the conclusion of the libelant's testimony, Careaga, appearing by Mr. Rosenberg, his attorney, addressed the Court as follows (R. 80):

> "The Court: In view of the default and failure to file an answer——
>
> Mr. Rosenberg: Your Honor,——
>
> The Court: *Pardon me, you have no standing here.* And the libellant having established a *prima facie* cause sustaining all the material allegations of the libel, a decree in conformity with the prayer will be granted, and the libellant is directed also to file findings of fact and conclusions of law.
>
> Mr. Ryan: Yes, sir.
>
> Mr. Rosenberg: Your Honor,——
>
> The Court: *You have no standing.*
>
> Mr. Rosenberg: May I make a remark?
>
> The Court: *You may not"* (fols. 341, 342).

Since the libel as stated by petitioner at page 21 of its brief, related to a dispute between the master and crew of a Spanish vessel, the Courts of the United States were forbidden by Article XXIII of the Treaty to interfere in said dispute on any pretext whatever. (Article 23 of the Treaty is printed as an appendix to this brief.)

Since the provisions of Article XXIII of the Treaty were being violated, the Acting Consul General had the right under Article XXI of the Treaty to address the Court directly.

In *The Belgenland,* 114 U. S. 355, 365, this Court said:

> "Of course, if any treaty stipulations exist between the United States and the Country to which a foreign ship belongs, with regard to the right of the consul of that country to adjudge controversies arising between the master and crew, or other matters occurring on the ship exclusively subject to the foreign law, such stipulations should be fairly and faithfully observed. *The Elwin Kreplin,* 9 Blatchford 438, reversing S. C. 4 Ben. 413; See S. C. on application for mandamus, *Ex Parte Newman,* 14 Wall. 152."

Subsequently the Consul General again addressed the Court, this time by motion in the Circuit Court of Appeals requesting leave to appeal to that Court and there call attention to the violation of the Treaty. This application was denied by the Circuit Court of Appeals (R. 225).

We respectfully submit that Acting Consul General Careaga had properly availed himself of the right granted by Treaty to address the Court for the purpose of complaining of an infraction of the Treaty.

B.

Since the District Court had failed to pay due respect to the wishes of the Consul in regard to taking jurisdiction of this controversy, the Ambassador directed a diplomatic note to the Secretary of State of the United States and received the following reply:

"Excellency:

Reference is made to your note of December 10, 1936, regarding a case pending in the United States District Court for the Eastern District of New York concerning the right to possession and ownership of the foreign steamship 'Navemar', in which you request that representations be made by the Attorney General of this Government in behalf of your Government.

In reply you are informed that it is the practice of this Department in cases such as the one presented in your note to refrain from taking any action which might constitute an interference by the executive authorities of this Government with regard to the merits of the controversy. As your Embassy was orally advised this morning, your Government has the right to appear directly before the court in a case of this character" (R. 254).

The Ambassador thereupon authorized Jesse L. Rosenberg to act as attorney. The telegram of authorization reads as follows:

"I hereby authorize you to represent me before the United States District Court, New York City, in the case of *S. S. Navemar,* which is the property of the Spanish Government.

Sgd. FERNANDO DE LOS RIOS
Spanish Ambassador"

(R. 253).

The Ambassador also granted a power of attorney to Luis Careaga, the Acting Consul General, authorizing him to represent the Ambassador and to perform all necessary ministerial acts in order to perfect the appearance of the Ambassador as a party claimant in this litigation (R. 257).

In *The Pesaro,* 255 U. S. 216, and in *Ex parte Muir,* 254 U. S. 522, this Court pointed out three permissible and adequate forms of procedure by which the question of jurisdiction could be raised. They are as follows:

1. If the foreign Sovereign deems it inadvisable to appear in the courts of the United States, a diplomatic representation can be made to the Department of State to the end that the Attorney General will file a suggestion of immunity.

2. The Sovereign itself as of right is entitled to appear in the suit to propound its claim to the vessel and to raise the jurisdictional question.

3. The accredited and recognized representative of the foreign Sovereign may appear and take the same steps in the foreign Sovereign's interests.

The Ambassador having considered the matter diplomatic rather than judicial, had addressed a note to the Secretary of State and in due course had received the reply quoted above. Having been advised by the Secretary of State of the United States that he had the right to appear directly before the Court, the Ambassador sought to appear as claimant of the "Navemar".

The first application of the Ambassador was made by order to show cause dated December 16, 1936, which order was supported by an affidavit of Luis Careaga. It is in the form of a suggestion by Fernando de los Rios, Ambassador of the Republic of Spain, and prays that the default decree be vacated, that the "Navemar" be returned to the custody of Luis Careaga for and on behalf of the Republic of Spain and that the prosecution of all actions against the ship be restrained (R. 100). This application was denied by the District Court by order dated January 4, 1937, which order provided, among other things that "permission be granted to the said Fernando de los Rios, Ambassador of the Republic of Spain, to present another application for leave to appear" (R. 118).

A second application was thereupon made by order to show cause dated January 8, 1937 (R. 118). One of the supporting affidavits on this application of the Ambassador was also signed by Luis Careaga. In this application the Ambassador prays that the default be opened and that Fernando de los Rios, Ambassador of the Republic of Spain, without waiving any favors, privileges, immunities and exemptions to which he is entitled as said Ambassador, be permitted "to appear as claimant" of the steamship "Navemar" (R. 119). Only this second application is now before this Court.

We submit that there has been no delegation of diplomatic functions by the Ambassador, as argued by Petitioner. Careaga merely verified the petition, as he had a right to do under the Ambassador's power of attorney and under Admiralty Rule 12 of the District Court for the Eastern District of New York (Appendix B). This rule further provides that if the personal oath of a non-resident party is demanded, a

motion may be made for a stay pending the procurement of such verification. No such motion was made by libelant in the District Court.

As the Circuit Court of Appeals has pointed out, "the Ambassador had followed a permissible and adequate procedure, distinguished from that which was held insufficient in *United States* v. *Pesaro* (255 U. S. 216) and *Ex parte Muir* (254 U. S. 522)" (R. 229).

POINT II.

On principles of international comity, the statements of the Ambassador as to the right of the Republic of Spain to possession of the "Navemar", a Spanish vessel which, at the time of requisition by the Republic of Spain, was owned by a Spanish corporation should be accepted as conclusive by the courts of the United States.

In *Ex parte Muir, supra,* and in *The Pesaro, supra,* this Court disapproved the practice of accepting a suggestion by an Ambassador presented by private counsel appearing as *amicus curiae,* which practice had been recognized by the lower courts in many earlier cases, and stated that a proper procedure to be followed in such cases was for the Ambassador to propound his claim to the vessel in the attitude of a suitor and to thus raise the jurisdictional question. In other words, these cases related only to procedure, and in no way affected the well settled principle that in a suit in a foreign court in which a sovereign is a party, the statement of the Ambassador as to the law of his country cannot be challenged by judicial inquiry.

In the present case the Ambassador of Spain had sought to file his claim and to raise the jurisdictional

question. Counsel for petitioner argue, however, that the Ambassador's statements as to the law of Spain and as to the fact of expropriation of the "Navemar" are subject to judicial inquiry and that the Ambassador must submit himself to the jurisdiction of the Court and offer proof of his allegations. The Circuit Court of Appeals, on the other hand, has found that the allegations of the Ambassador as to possession and ownership of the "Navemar" by the Republic of Spain must be taken as conclusive (R. 231).

In this connection we call attention to the opinion, in *Martiarena* v. *Amaliobeta and Urutia,* printed as Appendix B of Petitioner's brief, where this same principle was recognized by the Civil Court of Antwerp:

> "Whereas, therefore, if it is asserted that an official declaration of a foreign Minister must be taken as the truth, this applies however only in as far as this declaration relates to an action in which the foreign state is itself concerned, either direct, or indirectly, *quod non;*"

An able discussion of the immunity of an Ambassador from such judicial inquiry is contained in the opinion of Rellstab, *J.,* in *The Roseric,* 254 Fed. 154. At page 162 the Court said:

> "Libelant further contends that the suggestion of the British government is not conclusive, and, if so intended, is not properly before the court, because not presented by the United States attorney. As to the conclusiveness of the suggestion: In *The Exchange, supra,* the libelant answered the suggestion interposed on behalf of the French government and sought to put it in issue. The Supreme Court, however, accepted the facts

as declared in the suggestion. In *The Parlement Belge, supra,* the court, to a like contention, by Brett, *L. J.,* said:

> 'The ship has been by the sovereign of Belgium, by the usual means, declared to be in his possession as sovereign, and to be a public vessel of the state. It seems very difficult to say that any court can inquire by contentious testimony whether that declaration is or is not correct. To submit to such an inquiry before the court is to submit to its jurisdiction. It has been held that, if the ship be declared by the sovereign authority by the usual means to be a ship of war, that declaration cannot be inquired into. That was expressly decided under very trying circumstances in the case of *The Exchange.* Whether the ship is a public ship, used for national purposes, seems to come within the same rule.' "

In *The Adriatic,* 258 Fed. 902, 904 (C. C. A. 3), the Court said:

> "On principles of international comity, we feel bound to accept the suggestion and avowal of the British ambassador as conclusively establishing both the fact of the requisition and its governmental character. Such has been the practice, as to similar facts, of the English courts (*The Parlement Belge,* L. R. 5 P. D. 197; *The Constitution,* L. R. 4 P. D. 39), and quite generally of the courts of this country. See *The Maipo* (D. C. S. D. N. Y.), 252 Fed. 627; *Agency of Can. Car & F. Co.* v. *American Can Co.* (D. C. S. D. N. Y.), 253 Fed. 152; *The Roseric* (D. C. N. J.), 254 Fed. 154, where the suggestions were made directly by counsel for an embassy, and *The Exchange,* 7 Cranch 116, 3 L. ed. 287, where it was

made through the attorney for the United States."

In *The Maipo,* 252 Fed. 627, 628, Judge Mayer stated:

> "The suggestion is not open to question and must be accepted as made * * *. It is enough that the fact is presented to the Court, as here, by the duly accredited official of the foreign government."

To like effect, where a suggestion was made by the Italian Ambassdor, in *The Carlo Poma,* 259 Fed. 369, 370, Judge Ward stated:

> "That the suggestion was sufficient proof of the statements contained in it is not seriously contested. We accept it as verity."

The doctrine of immunity of the duly accredited representative and of other instrumentalities of a foreign sovereign in the courts of another sovereign

> "is based upon the idea that sovereigns are of equal dignity and independence, and that out of regard for such rights, and to maintain and further amicable relations among them, it is, by tacit agreement, recognized as needful, in certain particulars, that one sovereign should decline to exercise some of its prerogatives where to exercise them would necessarily place another sovereign in a subordinate position." *The Roseric,* 254 Fed. 154, 161."

These fundamental principles of comity and international law were recognized by the Circuit Court of Appeals when in its opinion it said (R. 231):

> "The claim of this public control is borne out by the Ambassador's suggestion and his desire to

intervene. The allegations of the suggestion we are bound to accept as conclusive. * * * It is not for us to examine the propriety or to determine the validity of the decree affecting property within the foreign sovereign's dominion. If by any misadventure the authorized representative of a foreign state should make an unfounded suggestion, the proper remedy would be through diplomatic channels between the two sovereigns and not by legal proceedings against an independent sovereign or its property."

POINT III.

If as stated by petitioner this suit was instituted because of the unlawful action of five members of the crew of the "Navemar" all of whom were Spanish citizens, the courts of the United States had no jurisdiction because of the provisions of the Treaty; if, on the other hand, this is a possessory suit in which a Spanish corporation is endeavoring to question the right of the Government of Spain to possession of the "Navemar", the matter is not justiciable, and the Circuit Court properly declined to take jurisdiction since a sovereign is not subject to the process of the Court.

Petitioner at page 21 of its brief calls the Court's attention "to the fact that the circumstance which led to the institution of this suit was the unlawful action of five members of the crew who interfered with the orderly operations of the 'Navemar' while she was lying at anchor in New York harbor, in preventing a repair gang from Robins Drydock from making necessary repairs (R. 171), which the master had ordered on the petitioner's instructions (R. 171)". We cannot concede that the action of these men was unlawful, since it had been approved by the Consul;

but assuming this statement to be otherwise correct, then by virtue of the provisions of Article XXIII of the Treaty (Appendix A) the Courts of the United States were forbidden "on any pretext whatever" to take jurisdiction, and the Consul properly availed himself of the right guaranteed by Article XXI of the Treaty to appear in person before the Court and protest against this violation of the Treaty rights of the Republic of Spain.

Moreover in all reported cases which relate to a dispute involving only citizens of a foreign sovereign and a vessel of that sovereign, it has invariably been held, for the reasons stated by this Court in *The Belgenland,* 114 U. S. 355, 364, that "on general principles of comity, admiralty courts of other countries will not interfere between the parties in such cases unless there is a special reason for doing so, and will require the foreign consul to be notified, and though not absolutely bound by, will always pay due respect to his wishes as to taking jurisdiction".

But the Circuit Court of Appeals looking beyond the ostensible purpose of the suit said:

> "Jurisdiction to entertain this suit is challenged because (1) by virtue of Art. XXIII, of the Treaty between Spain and the United States matters relating to the 'internal order of merchant vessels' and to 'differences which may arise either at sea or in port between captains, officers and crews' are placed within the cognizance of the Consuls of the respective nations; and (2) that the 'Navemar' being a public vessel of the Spanish Government is immune from judicial process. The first ground may be dismissed with the observation that the issue in this case is one of title or ownership to the 'Navemar' and not the mere

settlement or adjustment of internal differences on the vessel" (R. 230).

In this view of the case, the decision of the Circuit Court of Appeals in refusing to entertain jurisdiction is entirely correct. The libel in the present case was *in rem* and, as pointed out by the Circuit Court of Appeals, "an action against a foreign vessel is not only *in rem,* but also *in personam* against the foreign sovereign. *The Parlement Belge,* 5 P. D. 197". Since the Republic of Spain, through its duly accredited representative, has itself asserted claim to the vessel, the controversy in its very nature is not justiciable in the Courts of this country.

The Exchange, 11 U. S. 116;
Texas Co. v. *Hogarth,* 256 U. S. 619;
Berizzi v. *Pesaro,* 271 U. S. 562;
The Maipo, 259 Fed. 367.

If the sole issue is one of title and ownership and the case is to be regarded as a possessory suit designed to question the right of the Government of Spain to possession of the "Navemar", then the principles of *The Exchange,* 11 U. S. 116, are applicable. The distinction between possessory suits and suits which arise out of a wrong committed by the vessel itself (such as cases of cargo damage, collision, etc.) has been clearly brought out by this Court in that case and subsequent cases. In *The Exchange,* the District Court had dismissed the libel on the ground that a public vessel of a foreign sovereign is not subject to the ordinary judicial tribunals of this country "so far as regards the question of title". The Circuit Court of Appeals reversed the decree of the District Court, but this Court directed that the

decree of the District Court dismissing the libel be reinstated.

Although *The Exchange* concerned a public armed vessel of a foreign sovereign and the instant case involves a merchant ship, it is submitted that the principles laid down by this Court in *The Exchange* would have been in no wise different if the vessel had been engaged in the merchant service instead of in the naval service of the foreign sovereign.

Berizzi v. *Pesaro,* 271 U. S. 562;
The Maipo, 259 Fed. 367.

This distinction between a possessory action and an action arising out of a wrong committed by the ship itself which was first suggested by the words "so far as regards the question of title" in *The Exchange, supra,* is clearly asserted in *The Belgenland,* 114 U. S. 355, where this Court said, at page 365:

> "So in a question of ownership of a foreign vessel, agitated between subjects of the nation to which the vessel belonged, the English Admiralty, upon objection being made to its jurisdiction, refused to interfere, the consul of such foreign nation having declined to give his consent to the proceedings."

In England it is well settled that the admiralty courts will not take jurisdiction of such possessory actions involving foreign vessels unless by consent of the parties or by request of the representatives of the foreign sovereign.

The Evangelistria, 2 P. D. 241;
The Agincourt, 2 P. D. 239;
The See Reuter, 1 Dodds. 22.

Petitioner is endeavoring to apply the principles applicable to cargo and collision cases, to a possessory suit between a foreign corporation and the Sovereign to which that corporation owes its very existence (Pet. Brief, pp. 27, 28).

In cases of cargo and collision damage there is, of course, every reason for requiring proof of the fact that the vessel owned or operated by the foreign sovereign was actually engaged in the public service at the time of the commission of the wrong. In such cases, the Courts have consistently held that the vessel can be immune from process only upon a showing of use by the sovereign itself at the time the wrong was committed.

The Davis, 77 U. S. 15;
The Johnson Lighterage Co., 231 Fed. 365;
The Attualita, 238 Fed. 909;
The Maipo, 259 Fed. 367;
The Carlo Poma, 259 Fed. 369;
Berizzi v. *Pesaro,* 271 U. S. 562.

In discussing the question of immunity of the property of a sovereign in a cargo case Judge Ward in *The Carlo Poma, supra,* said:

> "The English courts go the whole way in refusing process against property of a foreign sovereign under any circumstances. This because of the international comity due from one sovereign to another. *The Parlement Belge,* Law Reports, 5 P. D. 197; *The Jassy* (1906), P. 270.
>
> The law of the United States is the same, except that the immunity of property of a sovereign, whether the United States or a foreign sovereign, depends, not merely upon the ownership, but also upon the actual possession by the sovereign

of the property at the time process is served. *The Davis,* 10 Wall. 15, 19 L. Ed. 875; *Long* v. *The Tampico* (D. C.), 16 Fed. 491; *The Attualita,* 238 Fed. 909, 152 C. C. A. 43."

The stated theory underlying the rule applied by the Courts of this country, is that, if the ship is not in the possession or service of the Sovereign, the mere issuing of process against the vessel which is being operated by someone other than the Sovereign, in no way affects the rights of the Sovereign.

But these principles are not applicable to a possessory suit in which one party is the Sovereign and the other a corporation which owes its existence to that Sovereign, for the reason that the question is not justiciable not only because the foreign law is immune from attack judicially but for the greater reason that the sovereign himself is immune.

Ex parte State of New York, 256 U. S. 490.

However, even if the principles relating to cargo and collision cases were here applied, we submit that it has been conclusively established that the "Navemar" was in the possession and the service of the Republic of Spain and hence immune from process. Such in fact has been the decision in every case cited by petitioner in which, as here, there was a representation by the Ambassador of possession and employment by the sovereign.

POINT IV.

That the steamship "Navemar" was actually in the possession of the Republic of Spain at the time of her arrival in the United States, is conclusively established not only by the Ambassador's representations, but also by the proofs offered by the libelant in the District Court before the entry of the default decree.

The statements of the Ambassador of the Republic of Spain as to the law of his country in a case in which his Sovereign is a party cannot be controverted in the courts of the United States. The material allegations of the suggestion are as follows (R. 120-126):

1. That the Republic of Spain is a sovereign nation.

2. That by Treaty the Ambassador of the Republic of Spain is granted full favors, privileges, immunities and exemptions.

3. That the "Navemar" is a Spanish vessel under the flag of Spain.

4. That by the law of the Government of Spain the steamship "Navemar" was attached by the Spanish State and is a vessel in the service of the Spanish State for its national public service.

5. That when the "Navemar" was libeled in New York, she was being held by the Spanish Government for the purpose of carrying cargo from New York to Spain.

6. That at all times mentioned in the libel the steamship "Navemar" was in the possession of the Republic of Spain and subject to its direction and

control for use in its national public service as distinguished from any possession, direction, control or use of any individual citizen of the Republic of Spain, private or official.

7. That the Republic of Spain has not consented to being sued in the Courts of the United States.

8. That the said steamship under the laws of Spain was under the absolute control of the Republic of Spain.

However, apart from the allegations of the suggestion, it has been established by the libelant's own testimony that the vessel was in fact in the actual possession of the Republic of Spain at the time she arrived in New York and during all times thereafter until her crew were removed from the vessel under process of the District Court issued under this libel. The facts proved by libelant have been found by the Circuit Court of Appeals to be as follows (R. 232):

1. That the register and roll of the "Navemar" each contained an endorsement which indicated that under Spanish law the steamship "Navemar" became the property of the Spanish Government by decree of confiscation published on the 11th of October, 1936.

2. That the master of the "Navemar" at Buenos Aires, recognizing the authority of the Spanish Government, placed himself at the disposal of the Spanish Consul at Buenos Aires pursuant to direct instructions by the Spanish Government.

3. That the master on December 7, 1936, advised the former owners of the vessel that on October 28, 1936, the Spanish Government had in fact obtained possession of the "Navemar", and that since that

date the said master had been generally under orders of the Spanish Government.

4. That on arrival in New York the master received from the Spanish Consul at New York the sum of $300 to attend to the expenses of the vessel (Note).

Furthermore, on arrival at New York the master of the "Navemar" deposited the usual ship's documents with the Collector of Customs at the Port of New York. Among these documents was the ship's register, on which appeared the endorsement over the signature and seal of the Spanish Consul at Buenos Aires to the effect that the "Navemar" was owned by the Republic of Spain. The manifests of the "Navemar", which had also been deposited with the Collector of Customs of the United States contained the notation that the ship was "owned as set forth in the register" (pp. 4, 5, *supra*).

It follows, therefore, that it has been conclusively established that as between the libelant, a Spanish corporation, and the Republic of Spain the latter was actually in possession of the "Navemar" at the time she arrived in New York.

It has been argued by the petitioner that constructive possession by a foreign government of a vessel is not sufficient to render her immune from suits in the courts of the United States. A complete answer to that argument, if the argument were in fact applicable to a possessory suit, is that the possession of the Republic of Spain was actual and not constructive.

Note—At page 30 of its brief, Petitioner discusses the payment of wages by the libellant. We deem this discussion irrelevant to the issues here presented, but for the information of the Court we have prepared a review of the facts attending this payment which is printed as Appendix C of this Brief.

In *The Roseric,* 254 Fed. 154, 160 (D. C. N. J.), the Court, after discussing the effect of the presence of the owner's crew on a vessel after requisition by the British Government, said:

> "The contention of libelant that, as the ship's officers and crew operated the 'Roseric', she was within the exception established by these cases, is not tenable. The British government, in the exercise of its sovereign powers, took the 'Roseric' and devoted it to its own purposes. That no change in the officers and crew took place, and that they continued in the employment of the ship's owner, is unimportant. The ship, its owner, officers, and crew, were under the compulsion of sovereignty.
>
> * * * Whether the government should operate the ship by the owner's officers and crew or others was for the sovereign's exclusive determination.
>
> The effect of its requisition was to put the ship and its equipment into the public service. The officers and crew, as well as the ship, for the time being became the sovereign's instrumentalities, and whatever possession of the ship they obtained by reason of this employment was the sovereign's possession while the requisition was in force.
>
> In legal effect a ship so subjected to *vis major* is no less in the possession of the sovereign than if he had taken it over by a regular charter or had manned it by his navy."

So, too, in Hyde, International Law, Volume I, page 445:

> "In such case the dedication of the ship to public service would seem to render the constructive possession of the sovereign as efficacious for purposes of exemption as actual possession mani-

fested by the assertion of control through the medium of its own officers."

See also:

The Adriatic, 258 Fed. 902 (C. C. A. 3).

The statement by petitioner that the decision of the Circuit Court of Appeals in respect to possession is in conflict with the decision of this Court in *The Davis*, 77 U. S. 15, is incorrect and the incomplete quotation from that decision is misleading. We shall quote from *The Davis*, at page 21, and shall italicize so much of the quotation as has been omitted in the petitioner's brief.

> "But what shall constitute a possession which, in reference to this matter, protects the goods from the process of the Court? The possession which would do this must be actual possession, and not that mere constructive possession which is very often implied by reason of ownership under circumstances favorable to such implication. *We are speaking now of a possession which can only be changed under process of the court by bringing the officer of the court into collision with the officer of the government, if the latter should choose to resist. The possession of the government can only exist through some of its officers, using that phrase in the sense of any person charged on behalf of the government with the control of the property, coupled with its actual possession. This, we think, is a sufficiently liberal definition of the possession of property by the government to prevent any unseemly conflict between the court and the other departments of the government, and which is consistent with the principle which exempts the government from suit and its possession from disturbance by virtue of judicial process.*"

We submit that under the allegations of the suggestion of the duly accredited representative of the Republic of Spain, and on the proofs established by libelant, there was such a possession vested in the Government of Spain that to change or divest it under process of the court, would be to bring the officer of the court into collision with the officer of the government, since the latter has, in this case, chosen to resist.

POINT V.

The steamship "Navemar" having been in the actual possession of the Republic of Spain at the time of her arrival in the United States, the proceedings now before the Court cannot be interpreted as an attempt on the part of the Republic of Spain to enforce a decree of confiscation within the territorial limits of the United States.

The "Navemar" is a Spanish vessel; the libelant is a Spanish corporation, all of whose stockholders are Spanish citizens; the members of the crew are all Spanish citizens; the Ambassador of Spain states that under Spanish law the ship is the property of the Republic of Spain.

In *United States* v. *Belmont,* 301 U. S. 324, this Court said:

> "What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled. So far as the record shows only the rights of the Russian corporation

> have been affected by what has been done and it will be time enough to consider the rights of our nationals when, if ever, by proper judicial proceeding it shall be made to appear that they are so affected as to entitle them to judicial relief."

The duly authenticated documents of the vessel indicated that when she arrived here she was the property of the Republic of Spain.

In the *Santissima Trinidad,* 20 U. S. 283, 334, Mr. Justice Story said:

> "In general, the commission of a public ship, signed by the proper authorities of the nation to which she belongs, is complete proof of her national character; a bill of sale is not required to be produced. Nor will the courts of a foreign country inquire into the means by which the Title to the property has been acquired. It would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them, in cases where he has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy. The commission therefore of a public ship when duly authorized, so far, at least, as foreign courts are concerned, imparts absolute verity, and the title is not examinable. The property must be taken to be duly acquired, and cannot be controverted. This has been settled practice between nations; and, as a rule founded in public convenience and policy, cannot be broken in upon, without endangering the peace and repose, as well of neutral, as of belligerent sovereigns."

The labored argument of counsel for petitioner in an attempt to make it appear that the Government

of Spain is in this proceeding endeavoring to enforce a decree of confiscation within the territorial limits of the United States finds no support in the record. On the contrary, in the libel, verified by petitioner, it is alleged that the crew took possession of the "Navemar" in October, 1936 (R. 4), before the vessel arrived in the United States. As the Circuit Court of Appeals said, they were acting under the compulsion of the Sovereign and the lawfulness of their acts is borne out by the desire of the Ambassador to intervene and file claim to the "Navemar".

Petitioner contends (Petitioner's Brief, pp. 21-27) that the mere fact of the filing of a libel and issuing of process under that libel by Robins Drydock & Repair Company against the "Navemar" *in rem,* somehow affects the right to continued possession of the "Navemar" by the Republic of Spain and the immunity of the Spanish Ambassador. The libel of the Robins Drydock & Repair Company against the "Navemar" was brought to recover the amount of a bill for repairs which had been incurred on the order of Linea Sud Americana, charterer of the "Navemar", on a previous voyage before the vessel had been requisitioned by the Republic of Spain. The libel was filed on December 4, 1936 and process was returnable on December 16, 1936, this being the usual period within which process is returnable in the United States District Court.

The libel in this possessory suit was filed on December 7, 1936, and by special order of the District Court, procured by petitioner's proctors, process was made returnable, not within the usual time limit, but on December 9, 1936, less than 48 hours after the libel had been filed and process issued. Having now before us petitioner's present argument, the reason for the undue insistence by counsel for petitioner for an

immediate hearing by the District Court (R. 8-14) and for the disregard of the request of the duly accredited representative of a friendly foreign state for a reasonable time within which to communicate with the Ambassador and make necessary diplomatic representations, become clearly apparent. The testimony of the libelant was taken summarily. At the close of the hearing, the Court directed the submission of findings of fact in accordance with Rule 56½ of this Court. Without complying with the provisions of Rule 56½ or with the request of the District Court for findings of fact, proctors for petitioner herein immediately submitted a final decree to the Court which was signed by the Court on the same day, December 14, 1936. Since this decree entered on December 14, 1936 provided that the petitioner (libelant below) was alone entitled to possession of the "Navemar" as against the world, any attempt by the Ambassador or by any person other than the libelant to file claim to the "Navemar" in the Robins Drydock suit (which was not returnable until two days later, December 16th), would at least have been discourtesy to the Court if not actual contempt of Court.

Counsel for petitioner well know that the Circuit Court of Appeals had before it all of these facts and, being fully apprised of the situation, has effectively restrained further proceedings in the Robins' libel and has granted to the Ambassador leave to intervene in that suit and in others now pending against the "Navemar" (R. 211). That the Ambassador has chosen to take no further action in these other cases until after a final determination of the present possessory suit, can in no way affect his right to possession of the "Navemar" against the claim of petitioner.

Petitioner's argument overlooks the fact that the decree of expropriation became the law of Spain on

October 11, 1936, long before the "Navemar" arrived in the United States and that by virtue of this decree the "Navemar" immediately became and has since remained the property of the Republic of Spain. This, the Ambassador advises the Court, is the law of Spain.

As the Circuit Court of Appeals has pointed out:

> "One of the first principles recognized in the rudimentary body of international law since the Middle Ages to our day is that a vessel is considered, constructively at least, as part of the territory of the sovereign whose flag it flies and is subject, while on the high seas, or in foreign territorial waters, to the jurisdiction of that sovereign" (R. 231).

The same doctrine has been stated by Wheaton on International Law at page 168 to be that:

> "Every state claims to exercise jurisdiction over its own merchant vessels wherever they are, and even when they are in the waters of another state."

Professor Holdsworth in an article entitled "The Power of the Crown to Requisition British Ships in a National Emergency" which appears in Volume 35 of the Law Quarterly Review, draws the following conclusion after a careful review of the authorities.

> "* * * it would seem that no distinction can be drawn between a prerogative to requisition a ship in territorial waters and a prerogative to requisition on the high seas" (p. 39).
>
> "It follows, therefore, that the prerogative of the Crown to requisition a British ship is not ousted merely because she is in a foreign port.

> Unless the authorities of the foreign country intervene, the owners of such a ship must obey the requisition, and act illegally if they do not."

In this connection we are not unmindful, and the petitioner has made much of the fact that the doctrine of the territoriality of a vessel is nothing more than a fiction. This has been so held in *Cunard SS. Co. v. Mellon*, 262 U. S. 100, 123, where this Court referred to the statement that a merchant ship is a part of the territory of the country whose flag it flies as "a figure of speech, a metaphor". But we submit that this conclusion is not inconsistent with the recognition of the right of a state to extend its jurisdiction over a vessel of the flag, wherever she may be. There may concededly be circumstances in the confessed practise of nations where the alleged territorial character will disappear whenever a foreign state shall have strong motives for ignoring it. Such undoubtedly would be the case where the vessel itself has infringed the local laws, for as the Court said in *Rex* v. *Lesley* (1860), 29 L. J. M. C. at page 101:

> "Although an English ship in some respects carries with it the laws of her country in the territorial waters of a foreign state, yet in other respects it is subject to the laws of that state as to acts done to the subjects thereof."

See also *The Queen* v. *Anderson* (1868), L. R., 1 Q. C. R. at page 165.

Where, however, no such situation obtains, the exercise of sovereignty over a vessel of the flag in foreign waters must be deemed inviolable. As this Court said in *U. S.* v. *Rodgers*, 150 U. S. 249 at p. 265:

> "The law of nations, as I have stated it, and the statutes of governments founded on that law,

as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but in the ports and harbors or wheresoever else they may be water-borne, for the general purpose of governing and regulating the rights, duties and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself."

And further support for this contention is found in the reasoning in *Cunard SS. Co.* v. *Melton*, 262 U. S. 100, 129, where this Court, after deciding that the operation of the National Prohibition Act by its terms was limited to territorial waters, added:

"In so saying we do not mean to imply that Congress is without power to regulate the conduct of domestic merchant ships when on the high seas, or to exert such control over them when in foreign waters as may be affirmatively or tacitly permitted by the territorial sovereign; for it long has been settled that Congress does have such power over them." *Lord* v. *Goodall, N. & P. S. S. Co.*, 102 U. S. 541, 26 L. ed. 224; *The Abby Dodge*, 223 U. S. 166, 176, 56 L. ed. 390, 393, 32 Sup. Ct. Rep. 310."

In this view of the case the right of the Republic of Spain to requisition the SS. "Navemar" either on the high seas or in the waters of another state cannot be questioned.

POINT VI.

The United States Circuit Court of Appeals, having reversed the order of the District Court denying the application of the Ambassador to intervene, properly directed the District Court to vacate the decree and dismiss the libel.

After the denial of the second application of the Ambassador for leave to intervene as a party claimant, the Ambassador applied to one of the judges of the United States Circuit Court of Appeals for the allowance of an appeal in accordance with the provisions of Section 132 of the Judicial Code, 28 USCA 228. The appeal was allowed by Honorable Martin T. Manton and the notice of appeal provided that:

> "Petitioner Fernando de los Rios, Ambassador of Spain to the United States of America in behalf of the Republic of Spain, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the default decree entered herein on the 14th day of December, 1936 and from the decisions and orders entered herein on the 4th day of January, 1937 and on the 3rd day of February, 1937, sustaining the exceptions of the libellant and denying the motion to open the default and from each and every part of said decree, decisions and orders as well as from the whole thereof."

The libelant (petitioner in this Court) made a motion in the Circuit Court of Appeals to dismiss the appeal and the Circuit Court of Appeals after hearing argument dismissed the appeal insofar as it related to the default decree of December 14th, 1936 and the first application for leave to intervene.

The Court, however, allowed the appeal from the order denying the second application for the Ambassador to intervene.

While it is, in effect, conceded by petitioner that the Circuit Court of Appeals had the power to reverse the order of the District Court denying the second application of the Ambassador to intervene, it is argued by petitioner that the Court had no power to direct the District Court to enter an order dismissing the libel. The substance of petitioner's argument is that since the appeal from the final decree has been dismissed, that decree was not before the Circuit Court of Appeals for review and hence the Court was without power to direct a dismissal of the libel and that at most the Court should have directed that the Ambassador be permitted to file claim and establish, if he could, the facts set forth in the suggestion and affidavit filed by him.

The language of the Circuit Court of Appeals in its opinion is as follows:

> "Order reversed with directions to enter an order dismissing the libel."

Counsel for petitioner criticizes this decision as follows:

> "Apparently the Court took this action on the theory that the allegations made by the Ambassador were conclusive upon it and that it had no power to inquire into the truth or falsity of these allegations" (Petitioner's Brief, Point I, A, pp. 8-11).

To criticize this action of the Court is ill-founded under the authorities heretofore discussed, and we

submit that the procedure of the Circuit Court of Appeals was in all respects proper.

Having reversed the order of the District Court denying the Ambassador's second application to intervene, the Circuit Court, in effect, opened the way for the filing of the Ambassador's suggestion and claim to the "Navemar". The allegations of that suggestion the Court felt constrained to accept as conclusively establishing the fact of ownership, control and possession of the vessel by the Spanish Government. Since that was the only proof which the Ambassador would have needed to offer, the course of the Court was clearly dictated.

Furthermore, the Court had before it libelant's own proof adduced in the District Court which established that the "Navemar" was in fact in the actual possession of the Republic of Spain, at the time of the vessel's arrival in New York. In addition, the District Court had found in its opinion on the second application of the Ambassador to intervene that all of the material allegations and proof were before the Court (R. 172). Consequently, the Circuit Court was apprised of the details of the subject matter of the suit and of all the elements necessary to a final determination on the jurisdictional question involved.

To thereafter resort to the procedure contended for by petitioner herein would have served no effective purpose. If the order on mandate had been entered in due course by the District Court, it would have been provided, in accordance with the prayer for relief in the Ambassador's second application, that the final decree be vacated and the Ambassador be permitted to file his claim and suggestion. On well settled principles the District Court would then have been bound to accept the allegations of the sugges-

tion as conclusive and could not have inquired by contentious testimony whether the representations therein were correct or not. *The Parlement Belge*, 5 P. D. 197. Thereupon the only recourse of the District Court would have been to dismiss the libel for want of jurisdiction.

We submit that petitioner's argument is founded neither on reason nor convenience, and that the Circuit Court of Appeals properly advised the District Court in directing that the decree be vacated and the libel dismissed.

CONCLUSION.

The United States Circuit Court of Appeals for the Second Circuit has correctly applied the principles heretofore discussed, and therefore the order of the Circuit Court of Appeals reversing the order of the District Court and directing that the libel be dismissed, should be affirmed, with costs.

Respectfully submitted,

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APPENDIX A.

Article XXIII of the Treaty of Friendship and General Relations between the United States of America and Spain; Statutes at Large, 33 Stat. (Part 2) 2105.

"Consuls-General, Consuls, Vice-Consuls and Consular Agents shall have exclusive charge of the internal order of the merchant vessels of their Nation and shall alone take cognizance of differences which may arise, either at sea or in port, between the captains, officers and crews without exception, particularly in reference to the adjustment of wages and the execution of contracts. In case any disorder should happen on board of vessels of either party in the territorial waters of the other, neither the Federal, State or Municipal Authorities in the United States, nor the Authorities or Courts in Spain, shall on any pretext interfere, except when the said disorders are of such a nature as to cause or be likely to cause a breach of the peace or serious trouble in the port or on shore, or when in such trouble or breach of the peace, a person or persons shall be implicated not forming a part of the crew. In any other case, said Federal, State or Municipal Authorities in the United States, or Authorities or Courts in Spain, shall not interfere, but shall render forcible aid to consular officers, when they may ask it, to search for, arrest and imprison all persons composing the crew, whom they may deem it necessary to confine. Those persons shall be arrested at the sole request of the Consul addressed in writing to either the Federal, State or Municipal Authorities in the United States, or the Authorities or Courts in Spain, and supported by an official extract from the register of the ship or the list of the crew, and the prisoners shall be held during the whole time of their stay in the port at the disposal of the consular officers. Their release shall

be granted at the mere request of such officers made in writing. The expenses of the arrest and detention of those persons shall be paid by the consular officers."

(Note) Article XXIII of this Treaty was abrogated as of July 1, 1916 insofar as its provisions are in conflict with the Act of Congress approved March 4, 1915 (Seamen's Act), 38 Stat. 1164, 1184; Foreign Relations of the United States, 1915, pages 6 and 10; ibid., 1916; 33; 1918, pages 3 and 10, and 1919 (Vol. 1), pages 54-67. This limited abrogation does not affect the subject matter of this proceeding.

APPENDIX B.

Admiralty Rule 12 of the United States District Court for the Eastern District of New York.

12. Verification of Pleadings and Interrogatories.

Verification of pleadings and answers to interrogatories shall be by the parties or one of them if within the City of New York; otherwise by an agent, attorney-in-fact or proctor, who shall state briefly the sources of his knowledge or information, declare that the document affirmed to is true to the best of his knowledge, information and belief, and state the reason why the verification is not made by a party. If the personal oath of a party or all the parties be demanded, a motion may be made for a stay pending the procurement of such verification by commission or otherwise.

APPENDIX C.

Petitioner argues that, because of the fact that petitioner has paid certain sums to the members of the crew of the "Navemar" for wages earned during the voyage from Buenos Aires to New York, therefore it has been established that the ship had been operated by the libelant (petitioner in this Court). For the information of the Court, we submit the following resume of the facts leading up to the payment of these wages.

Although the libel in this case was brought against only five named respondents, the decree of the District Court entered on default, provided as follows:

> "Further, Ordered, Adjudged and Decreed, that any and all persons now on board the Spanish Steamship 'Navemar' who claim any interest in her adverse to the libellant or whom the libellant desires to have removed from the said Spanish Steamship 'Navemar' be and they hereby are directed to leave the Spanish Steamship 'Navemar'."

Thereafter libelant (petitioner in this Court) requested all of the loyal officers and members of the crew of the "Navemar" to leave the ship. This the men refused to do. Thereupon libelant obtained an order to show cause why the men should not be punished for contempt of Court. The men were removed from the vessel by the United States Marshal and brought before the District Court. The Court refused to punish them for contempt 17 Fed. Supp. 495, but the United States Marshal has since refused to permit these officers and men to return to the "Navemar". The men were left in a strange port without funds and without their own belongings. They thereupon filed a libel against the ship for wages and transportation to Spain.

On February 3rd, 1932 a restraining order was issued by the Circuit Court of Appeals, whereby all further proceedings in this case including release of the vessel by the United States Marshal was forbidden by the Court. Despite this restraining order, the Spanish corporation, claimant in the wage suit, on February 4, 1937 consented to a decree in favor of the wage claimants and forthwith paid the amount of this decree (R. 222-225).

In its brief, petitioner now argues that because of these actions by petitioner after this case was lodged in the Circuit Court of Appeals, this Court should draw the conclusion that the seamen of the "Navemar" were in fact in the employment of the libelant. The consent decree in the wage suit and the prompt satisfaction of the decree was accomplished while the question of title to the "Navemar" was at issue in the courts of the United States. No inference adverse to the Republic of Spain can be drawn from the voluntary action of the petitioner in consenting to a default decree in a suit to which the Republic of Spain was not a party.

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